

**American Rivers • Clean Water Action • Natural Resources Defense Council • Southern
Environmental Law Center**

The Honorable Bob Gibbs
Chairman, Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
329 Cannon House Office Building
Washington, DC 20515

The Honorable Timothy Bishop
Ranking Member, Water Resources and Environment Subcommittee
Transportation and Infrastructure Committee
306 Cannon House Office Building
Washington, DC 20515

July 23, 2014

**RE: Water Resources and Environment Subcommittee Hearing entitled “Integrated
Planning and Permitting Framework: An Opportunity for EPA to Provide Communities
with Flexibility to Make Smart Investments in Water Quality”**

Dear Chairman Gibbs and Ranking Member Bishop:

On behalf of our members and supporters, we thank you for holding this hearing entitled “Integrated Planning and Permitting Framework: An Opportunity for EPA to Provide Communities with Flexibility to Make Smart Investments in Water Quality” and for the opportunity to comment on this important issue and we ask that this letter be included in the record for the hearing. The broad topic of this hearing – how to address outdated and failing water infrastructure and the future of infrastructure investments to protect clean water and public health – is of critical importance to our nation. The Environmental Protection Agency (EPA), in its 2008 Clean Watersheds Needs Survey, reported that the combined wastewater and stormwater management needs total \$298.1 billion for communities across the country. An updated report, due to be delivered to Congress this coming December, will surely demonstrate a continuing gap between needs and allocated resources. At the same time, fiscal pressures on municipalities and declining levels of funding for the Clean Water and Drinking Water State Revolving Funds (SRFs) further demonstrate the critical need for communities to develop sustainable strategies that maximize the benefits per dollar invested.

Integrated planning and permitting offers an opportunity to more holistically approach the management and planning of stormwater, wastewater, and drinking water infrastructure systems. In doing so, municipalities and water utilities may be better able to use smarter and more sustainable approaches to protect clean water while delivering sustainable water services. Healthy floodplains, small streams, wetlands, and stream-side buffer zones are key elements of our water infrastructure and should be considered a first line of defense against pollution, floods, and drought. Innovative water infrastructure practices such as water efficiency and green infrastructure have far-reaching benefits, reducing polluted runoff, increasing recharge of drinking water supplies, and increasing valuable green space. These approaches provide multiple

benefits for every dollar invested and should drive any approach to integrated planning and permitting. As long as the fundamental standards and requirements established in the Clean Water Act to protect public health and the environment are preserved, this integrated approach could lead to improved consolidation of water services that benefit ratepayers, taxpayers, communities and the environment.

Under current law, EPA has ample legal authority to successfully achieve the goals of the *Framework*, which we believe are broadly shared by our organizations and the regulated community. Therefore, while Congressional oversight is essential, we do not believe that there is a need for legislation to effectuate or improve upon the *Framework* at this time.

EPA's *Integrated Planning Approach Framework*, released in 2012, is just that – a “framework,” rather than a set of prescriptions, for planning and decision-making by utilities, regulatory agencies, and affected members of the public. As such, we expect that its implementation will play out differently in different communities while at the same time maintaining compliance with existing Clean Water Act requirements. Before it can be considered a success or failure, we need opportunities to gain experience with how early-adopter cities and states, as well as EPA, apply the *Framework*'s principles to particular cases. This laboratory for experimentation will provide lessons to guide further refinement, as necessary.

EPA's Integrated Planning and Permitting Initiative

The Subcommittee plans to address the EPA's framework for integrated planning and permitting, entitled *Integrated Planning Approach Framework*, which was released in 2012. The integrated approach as envisioned in this framework could allow municipalities and utilities to maximize every dollar invested on pollution control measures that achieve water quality and community sustainability goals. Our organizations strongly support EPA's position that the integrated plans under the *Framework* must assure compliance with Clean Water Act requirements pursuant to existing regulations. We oppose any weakening of Clean Water Act requirements or exceptions from timely compliance with these requirements. Protecting our communities and clean water while at the same time funding efficient water services are both compelling and achievable potential benefits of the integrated permitting approach.

We have highlighted to EPA certain issues that deserve special attention in the implementation of the *Framework*, which we summarize below for the Committee.

Provide additional guidance on criteria and methodologies for evaluating alternatives and prioritizing implementation efforts.

The Framework would be strengthened if the EPA provides further guidance on criteria and methodologies for evaluating and prioritizing alternatives. The EPA should more fully detail current flexibilities under existing legal authorities and should provide more guidance regarding how state and federal enforcement agencies evaluate an integrated plan. The EPA should provide greater clarity to guide the process and reduce uncertainty in the development of an integrated plan. The Agency should incorporate expectations and examples consistent with EPA policy to strengthen and clarify the integrated

planning process. The EPA and states must require that integrated plans consider green infrastructure and innovative practices equally with more traditional alternatives and that best practices with no capital costs to the municipality, such as stormwater retention standards for new development and redevelopment, must be included in the integrated plan.

Provide additional guidance on measuring and determining affordability and financial capability.

As discussed previously, there is a significant need to invest in repairs or upgrades to outdated and failing water infrastructure. With declining funding under the Clean Water and Drinking Water State Revolving Funds and increasing fiscal pressures on municipalities, integrated planning can build on existing flexibilities. Any alternatives analysis under the *Framework* must provide a robust assessment of both benefits and costs of increased local investments in water infrastructure. Such an analysis would be valid only to the extent that it considers not just impacts to ratepayers of making infrastructure investments, but also the economic and other impacts of not making those investments. The EPA should clarify that the failure of a utility or community to raise water service rates as part of a sound asset management plan is not an excuse for prolonged implementation of upgrades under an integrated framework. Integrated plans must utilize all opportunities to supplement public funding with private investment and demand-side management, including water conservation programs, stormwater utility fee structures, and stormwater management regulations that drive the use of green infrastructure on private property to reduce burdens on public sewer systems. Regarding adequate and achievable rate increases, municipalities and utilities developing integrated plans to address wet weather water pollution should be required to consider parcel-based billing to more equitably distribute the burdens to ratepayers with the largest impervious surfaces and therefore the greatest contributions to stormwater pollution. Finally, once green infrastructure, water efficiency, and other innovative approaches are evaluated, alternative scenarios should be re-evaluated with respect to costs, benefits, and affordability. These strategies may provide opportunities to leverage investment or serve multiple functions.

Ensure robust public participation in decision making, including through the use of permits as an implementation mechanism wherever possible.

Our organizations favor utilizing the National Pollutant Discharge and Elimination System (NPDES) permit process to govern integrated planning wherever possible, rather than relying primarily on enforcement orders and decrees, while at the same time recognizing legal and practical concerns. The NPDES process ensures public participation and, with the five-year permit term, the flexibility to adaptively manage the integrated planning process. Additionally, NPDES permits are enforceable by other organizations, agencies, and entities that may be outside of a consent decree process. The permit process ensures notice, comment, and an opportunity for a formal administrative hearing where citizens can voice concerns. The EPA should use the *Framework* to further promote public participation by providing additional guidelines and assurances for robust

public participation in the integrated planning process. The EPA should also clarify that it is the responsibility of the municipality or the utility to demonstrate how it has comprehensively solicited, considered, and addressed public comments throughout the integrated planning process.

Provide additional guidance on monitoring and compliance assurance.

The ultimate goal of a NPDES permit is to ensure a discharger's compliance with applicable technology-based or water-quality based standards, to protect our ability to swim, fish, and drink from our nation's waters. It's critical that integrated plans include monitoring provisions that allow local governments to track the effectiveness of control measures and enable adaptive management. EPA should provide more robust guidance for an adequate monitoring and compliance evaluation program under an integrated plan. A compliance assurance program based on adaptive management must include performance targets, an adaptive management decision making process, a monitoring program, and a maintenance program.

In summary, our organizations believe that integrated planning and permitting can offer an important tool to municipalities and utilities to build upon existing flexibilities, maximizing every dollar invested on pollution control measures that achieve water quality and community sustainability goals. For more detailed comments, please refer to the attached document submitted to the EPA on February 29, 2012 on the Agency's draft version of the *Framework*.

Relevant Legislative Proposals

Our organizations thank the Subcommittee for the opportunity to discuss several legislative proposals that have been put forward to address integrated planning and permitting. We support integrated permitting efforts, but we believe strongly that flexibility should not come at the expense of clean water or community health. Although we are supportive of the intent to address implementation of integrated permitting and planning, we have serious concerns about the legislative proposals before the Subcommittee. Many of the provisions in these bills would weaken Clean Water Act protections and undermine successful efforts to protect public health in communities across the country. While we oppose all of these bills in their current form, we are especially alarmed by the draft Water Quality Improvement Act of 2013, which represents a blatant assault on the fundamental protections of the Clean Water Act.

H.R. 3862, the Clean Water Affordability Act of 2014

The Clean Water Affordability Act of 2014 (H.R. 3862) introduced by Representative Latta (R-OH) would amend the Clean Water Act to include language that establishes a process for integrated permits under Section 402. Importantly, the bill would effectively change the term limits of NPDES permits from no more than five years to allow for permit limits of up to 25 years if the permittee has an approved integrated plan. The current five year limit on permit terms has been a core element of the NPDES program since the inception of the Clean Water Act, which allows for adaptive management to

ensure that water quality goals are met. Extending permit terms to 25 years – essentially a generation – will result in a lack of accountability for meeting Clean Water Act goals and prevent water agencies from responding to evolutions in effective and affordable pollution control technologies. While discussions about affordability are critical, it should not be used as an excuse for deferring real progress for decades. Additionally, our organizations find that the bill's proposed changes to affordability guidance focus exclusively on compliance costs, ignoring the broader benefits of clean water to local and regional economies. The bill also fails to assess whether utilities have developed an optimal financial strategy (*e.g.*, improvements to rate structure and bonding authority, equitable distribution of costs among categories of ratepayers, etc.) that ensures capital programs are sufficiently funded, operated, maintained and replaced over time.

H.R. 2707, the Clean Water Compliance and Ratepayer Affordability Act

The Clean Water Compliance and Ratepayer Affordability Act (H.R. 2707) introduced by Representative Chabot (R-OH) would establish a pilot program for integrated plans to meet stormwater and wastewater obligations. While we are generally supportive of efforts to establish a pilot program to begin to implement integrated processes, EPA can do this under the existing *Framework* without more prescriptive legislative mandates. Moreover, as with H.R. 3862, we strongly object to the bill's authorization to extend NPDES permit terms to a maximum of 25 years. The Clean Water Act was written to eliminate pollution into our waters by 1985 using increasingly prescriptive permits updated every five years that take advantage of best practices and innovative technologies. As we indicated above, extending permit limits locks in place technologies and controls that may be outdated and even more expensive over the course of 25 years. Extending permit limits is not an effective way to protect clean water and meet the goals of the Clean Water Act to ensure the health and safety of our communities. Additionally, the bill's language that allows the EPA Administrator to "provide additional regulatory flexibility under the Federal Water Pollution Control Act in approving and implanting an integrated plan" is potentially unlimited in its scope and, therefore, would undermine accountability for meeting bedrock Clean Water Act requirements. Finally, our organizations believe that smarter infrastructure approaches, such as green infrastructure and water efficiency, should drive integrated water management and should be better prioritized in an integrated permitting and planning pilot program.

The Water Quality Improvement Act of 2013

The Water Quality Improvement Act of 2013 discussion draft prioritizes reducing costs at the expense of clean water and public health, in addition to creating additional pollution impacts which impose real costs on the public. Our organizations strongly oppose this legislation that would substantively weaken Clean Water Act protections, putting our waters and the communities that rely upon them at risk.

Section 3 of this draft legislation fundamentally and negatively alters the pollution prevention framework of the Clean Water Act that has successfully reined in the human and environmental impacts of water pollution for over 40 years. Under this provision, if

a municipality isn't meeting its water quality based pollution control requirements but has an integrated plan, it would be excused from its obligation to comply with the Act as long as it continues "to make reasonable progress towards meeting such limitations." Although the EPA Administrator would retain discretion to determine what constitutes "reasonable progress," a municipality would not be considered to be out of compliance with its permit if the applicable water quality standard is not "achievable" under EPA regulations or if the control measures are deemed to be not "affordable." This notion flips on its head the long-standing requirement that pollution dischargers adopt the "best" technology to reduce their impacts and must meet all applicable water quality standards, and prioritizes the financial status water agencies over the economic costs of pollution and public health threats borne by the public at large. Additionally, this bill would create a mechanism for establishing new water quality based effluent limitations based on "attainable water quality standards." These "attainable standards" include no criteria relating to public health impacts and very little relating to water quality itself. If these "technically achievable and economically affordable" water quality standards are met, no additional controls on the discharge are required.

This language is not only antithetical to the goals Congress set forth in the Clean Water Act, it is unnecessary. The Act already includes provisions for *temporary* relief from water quality standards based limitations, or to alter water quality standards that may not be realistically achievable. Where a designated use is not attainable, EPA, states, or tribes may refine or remove the use, or allow a time-limited (*e.g.*, 3 or 5 year) variance, provided that specific circumstances are met and the appropriate analysis is conducted. This "Use Attainability Analysis," and related EPA guidance, allows relaxation of (or temporary variance from) a water quality standard following a "structured scientific assessment of the factors affecting the attainment of the use, which may include the physical, chemical, biological, and economic factors as described in 40 CFR 131.10(g)." The draft legislation ignores this important safeguard in the current Act and regulations, which renders the bill unnecessary.

Additionally, Section 3 would authorize "unavoidable discharge from a sanitary sewer," placing these discharges, which include discharges of raw sewage known as sanitary sewer overflows (SSOs) under an integrated permit rather than a consent decree. This would weaken the provisions in EPA's "bypass" regulation that define the conditions under which a discharge that does not receive full secondary treatment (which removes solids, oxygen-demanding organics, and pathogens) is acceptable. According to the 2004 "Report to Congress on Impacts and Control of Combined Sewer Overflows and Sanitary Sewer Overflows," the EPA estimates that between 23,000 and 75,000 SSOs occur every year which send up to 10 billion gallons of raw sewage into our waterways annually.¹ Pathogens and pollutants present in SSOs pose a public health risk, such as contaminated drinking water supplies, as well as an economic impact, such as beach closures. While most of the illnesses caused by waterborne pathogens in the U.S. are not fatal, they can be life threatening to infants, the frail elderly, and those with weakened immune systems.

¹ Report to Congress on Impacts and Control of Combined Sewer Overflows and Sanitary Sewer Overflows, U.S. Environmental Protection Agency, 2004, Available online < <http://water.epa.gov/polwaste/npdes/cso/2004-Report-to-Congress.cfm> >.

Section 4 of the draft legislation would amend the Clean Water Act by changing control requirements for permits by adding the phrase “achievable and affordable” to limit the pollution controls that must be in permits for municipal separate storm sewer systems (MS4s). This could make it easier for dischargers to argue for the use of less stringent controls to protect water quality. Under current law, MS4 permits must require, at a minimum, pollution control measures that reduce stormwater pollution “to the maximum extent practicable.” While this existing law, and other complementary provisions of the Act, provides ample authority to EPA and the states to address our nation’s stormwater pollution problems, implementation of the existing standard over the past two decades has proven insufficient to protect our waters, as demonstrated by a landmark National Research Council study in 2009. Accordingly, Congress absolutely should not weaken the existing standard. Rather, EPA must *strengthen* enforcement and implementation of the existing Clean Water Act standard, such as through a rulemaking to set minimum national performance standards, and through stronger provisions in individual MS4 permits.

Under Section 6, the draft legislation would prohibit the EPA from imposing civil or administrative penalties for past Clean Water Act violations for municipalities that have implemented a plan to comply with their Clean Water Act obligations. This would effectively give dischargers a free pass for previous violations with no requirements that a municipality has to have fully implemented the compliance plan.

Section 7 of the draft legislation provides a new definition for a “bypass” at wastewater treatment plants. Under the draft legislation, a “bypass” is defined as an “intentional diversion of a waste stream from any portion of a treatment system. Treatment of a waste stream in accordance with the design of the treatment system shall not constitute a ‘bypass’ if the treatment system was approved or permitted by the Administrator, or in the case of an authorized state program, the Director, or if the discharge achieves technology and water quality based effluent limitations at the point of discharge.” Existing bypass regulations adequately provide the opportunity to bypass secondary treatment when there is no “feasible alternative” while at the same time protecting public health and the environment under typical conditions. The new definition in the draft bill not only undermine current EPA regulations restricting the use of bypasses (40 C.F.R. 122.41(m)), but also directly contradicts Section 402(q) of the Clean Water Act, which codifies EPA’s CSO Control Policy. The CSO Control Policy, which applies to treatment facilities receiving flow from combined sewage and stormwater sewers, expressly states that “the intentional diversion of waste streams for any portion of a treatment facility, including secondary treatment, is a bypass,” subject to the restrictions in EPA’s bypass regulation.² The EPA has prohibited sewage treatment bypasses except under specific, limited circumstances in order to avoid the problems caused when secondary treatment is omitted. Secondary treatment is critical to protect public health. A risk model where primary and secondary treatment wastewater is blended showed that more than 99% of the loading of pathogenic viruses and parasites come from the

² 59 Fed. Reg. 18688, 18693-94.

untreated portion of the flow, and the risks of swimming in waters receiving blended effluent are “100 times greater than if the wastewater had been completely treated.”³

Our organizations strongly oppose the Water Quality Improvement Act of 2013 and have significant concerns about many of the provisions contained in the legislative proposals before the Subcommittee.

In summary, we support a holistic approach to achieving clean and reliable water for our communities by using cost-effective and innovative investments in water infrastructure. Fundamentally, however, this approach must maintain protections for clean water and public health. We agree that there is a benefit to moving towards more integrated infrastructure through better planning, evaluation, and sequencing of investments, but especially if smarter infrastructure is driving this process. Specifically, green infrastructure, water efficiency and other innovative solution should be a key part of integrated water management. We have significant concerns about the above legislative proposals and urge Congress not to move forward with any of the bills on the Subcommittee’s agenda for this hearing.

Thank you for the opportunity to provide comment on this important issue and we look forward to working together on integrated permitting and planning in the future.

Sincerely,

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³ R. Katonak & J.B. Rose, *Public Health Risks Associated with Wastewater Blending*, Department of Fisheries and Wildlife, Michigan State University at 18 (Nov. 17, 2003) (“Adenoviruses, Calciviruses, Piconaviruses, and Rotaviruses cause 100,000’s of cases per year.”)

